Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Communications Assistance for Law Enforcement Act and Broadband Access and Services	**ET Docket No. 04-295** **RM-10865**

To: The Commission

REPLY COMMENTS OF THE UNITED STATES INTERNET SERVICE PROVIDER ASSOCIATION

December 21, 2004

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The United States Internet Service Provider Association ("US ISPA"), a group of the largest Internet service providers ("ISPs") and Internet portals in the United States,[1] submits these reply comments in response to the comments of the U.S. Department of Justice ("DOJ") and other parties in this proceeding.[2]

I. INTRODUCTION AND SUMMARY

DOJ's comments in this proceeding demonstrate that industry and law enforcement can find common ground regarding some of the issues raised in the Commission's Notice of Proposed Rulemaking ("NPRM") on the Communications Assistance for Law Enforcement Act ("CALEA"). US ISPA agrees with DOJ's comments on a variety of important issues, including that:

- the viability of particular CALEA standards should be considered via deficiency petitions under section 107(b) of CALEA and not in this proceeding;
- the nature of packet-mode call-identifying information ("CII") is different from circuit-mode CII and therefore must be clarified;
- the "binary" distinction between "telecommunications services" and "information services" under the Communications Act does not apply under CALEA;

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[1] The US ISPA member companies joining in these reply comments are AOL, BellSouth, MCI, Microsoft, SAVVIS, and SBC. US ISPA members Verizon and EarthLink do not join these reply comments. Many members of US ISPA joined to file comments as the ISP CALEA Coalition on April 12, 2004. *See* Comments of the ISP CALEA Coalition, *In re Communications Assistance for Law Enforcement Act Joint Petition for Expedited Rulemaking, filed by United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration,* ET Dkt. No. 04-295, RM-10865 (filed April 12, 2004). In this filing, US ISPA adopts and incorporates those comments as well as its November 8, 2004 comments on the Notice of Proposed Rulemaking in this proceeding. *See* Comments of the United States Internet Service Provider Association ("*US ISPA Comments*"). Individual members of US ISPA also filed individual comments on the NPRM, and many also may submit reply comments in this proceeding.

[2] *In re Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 04-187, ET Dkt. No. 04-295, RM-10865 (rel. Aug. 9, 2004) ("*CALEA NPRM*").

- trusted third parties ("TTPs") should not have a favored status; and
- the CALEA standards-setting process should not be restricted to entities accredited by the American National Standards Institute ("ANSI").

But significant areas of disagreement between industry and law enforcement also remain. A chief area of contention involves the extent to which the Commission should extend the scope of CALEA's coverage. In particular, the Commission should abandon its proposed distinction between "managed" and "non-managed" voice over Internet protocol ("VoIP") services and adopt an approach based upon the "information services," private network, and interconnecting telecommunications carrier exceptions.[3]

US ISPA and other commenters also disagree with law enforcement on other implementation issues. First, the task of enforcing CALEA capability requirements belongs to the federal courts, not the Commission. Second, the Commission should decline DOJ's invitation to adopt a *de facto* CALEA pre-approval review for future services. Third, CALEA compliance deadlines must be reasonable and must take account of product development cycles. Fourth, the Commission should reaffirm the authority of providers to recover the cost of facilities associated with responding to intercept orders.

II. INDUSTRY AND LAW ENFORCEMENT CAN REACH COMMON GROUND ON SEVERAL IMPORTANT CALEA IMPLEMENTATION ISSUES

US ISPA can find common ground with DOJ on several important issues raised in the *CALEA NPRM* regarding the possible application of CALEA to broadband Internet access and VoIP service providers. As summarized in section I above, important areas of agreement relate to (1) the proper method for considering alleged deficiencies in CALEA standards, (2) the nature

[3] *See also* 47 U.S.C. § 1002(b)(2)(B) (excluding private networks and interconnecting telecommunications carriers).

of packet-mode CII, (3) the overlapping nature of "telecommunications services" and "information services" under CALEA, (4) the status of TTPs, and (5) the role of non-ANSI-accredited bodies in the CALEA standards process.

A. Deficiency Petitions Are The Appropriate Method for Resolving CALEA Standards Disputes

US ISPA agrees completely with DOJ that deficiency petitions under section 107(b) of CALEA are the proper method for resolving disputes about CALEA standards and that such disputes should *not* be resolved in this proceeding.[4] In its comments, DOJ states:

> DOJ's approach has been to resolve CALEA standards disputes at the standards-drafting level whenever possible, … and to seek Commission intervention only where necessary. Deficiency petitions create opportunities for the Commission and the public to explore standards issues in manageable stages, thus avoiding the impracticalities of trying to resolve all such issues in a single proceeding. Furthermore, individual deficiency petitions will ensure a sound record of facts and law.[5]

US ISPA favors the same approach and could not agree more.

B. Call-Identifying Information Is "Reasonably Available" Where It Is Routinely Used by a Service Provider and Does Not Require a Provider to Break Open Packets

CALEA requires carriers to provide law enforcement with access only to CII that is "reasonably available" to the carrier.[6] As US ISPA has explained, such information should be limited in the packet-mode context to CII that a carrier routinely uses in delivering services to its customers.[7] In important respects, the positions taken by DOJ support this approach.

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[4] *See US ISPA Comments* at 31-32; Comments of the United States Department of Justice at 39-44 ("*DOJ Comments*").

[5] *DOJ Comments* at 43.

[6] 47 U.S.C. § 1002(a)(2).

[7] *US ISPA Comments* at 17-27. *See also* Comments of Level 3 Communications, LLC at 6, 12-13; Comments of Verizon at 11-13; Joint Comments of Industry and Public Interest Submitted on Behalf of 8X8, Inc., American Library Association, Association of Research

Significantly, DOJ recognizes the considerable difficulties associated with "breaking open" packets,[8] stating that imposing CALEA on packet-mode service providers "does not necessarily mean that they are responsible for extracting all of the call-identifying information available within the subject's packet stream, particularly if it pertains, for example, to VoIP services that the carrier does not provide but that its subscribers may use."[9] DOJ indicates that providers need only be able to "isolate [a] subject's packet transmissions from those of other parties" along with "*reasonably available*, separated information as to the origin, direction, destination, or termination of the subject's packets."[10]

US ISPA agrees, to the extent the service involved is not an information service, as discussed in section II.C, below. Indeed, many Internet access providers have been cooperating with law enforcement requests for the provision of CII by passing along to law enforcement entire packet streams. To date, law enforcement has not objected to receiving packet-based CII in this manner. Given the absence of a legal basis under CALEA for a requirement that ISPs "break open" packets to find additional information and the willingness of law enforcement to accept packet streams, the Commission clearly should not require more – especially if it were to include telecommunications services used by ISPs under CALEA regulations.

Libraries, Center for Democracy & Technology, Comptel/Ascent, Computer and Communications Industry Association, Conference America, Dialpad Communications, Inc., Educause, Electronic Frontier Foundation, Free Congress Foundation, Information Technology Association of America, NetCoalition.com, Pulver.com, The Rutherford Institute, Sun Microsystems, and The Voice on the Net (VON) Coalition at 44-45 ("*Industry and Public Interest Joint Comments*").

[8] *US ISPA Comments* at 19.

[9] *DOJ Comments* at 7-8.

[10] *DOJ Comments* at 8 (emphasis added).

The Commission should confirm, however, that CALEA only requires a carrier to have the capability to isolate the communications of "a subscriber of such carrier,"[11] *i.e.*, a customer of the carrier. This means that where the customer is, say, a large organization with its own private network, the carrier is not required to have the capability to sort through all of that customer's traffic to isolate the communications of a particular user on the customer's network, even when that particular user is the intercept subject.[12] (This simply confirms current practice; law enforcement has never expected carriers handling corporate PBX calls to isolate and tap the calls of individual corporate employees located behind the PBX.)

US ISPA also agrees with DOJ that the Commission's proposed "significant modification" test for determining the kinds of CII that are "reasonably available" is vague and ambiguous and would have to be addressed from scratch with every new technology.[13] The test provides no certainty – indeed, no principle that can be applied without asking the Commission for a new ruling every time. A better result would be for the Commission to adopt the clear and simple test that CII is reasonably available if a carrier routinely uses such information in delivering services to its customers.

To the extent the Commission persists with the "significant modification" test, however, US ISPA disagrees with DOJ on how the test should be applied. First, DOJ argues that the "significant modification" test should not address "non-technical factors such as cost."[14] As US ISPA and other commenters point out, CALEA makes clear that cost is a critical consideration in

[11] 47 U.S.C. § 1002(a)(1).

[12] In any event, almost invariably, a carrier would not have the technical ability to isolate the communications of particular users on a customer's network because of the customer's use of dynamic IP addressing or network address translators.

[13] *DOJ Comments* at 44.

[14] *Id.* at 48.

determining whether CII is reasonably available.[15] Second, DOJ argues that the test should address modifications only at the "network design stage" and that later modifications should not be considered a bar to "reasonable availability," no matter how significant or costly they are.[16] This startling assertion ignores the fact that current broadband access and VoIP services were not developed with the substantially expanded CALEA coverage proposed in this proceeding in mind. It would be entirely inappropriate to ignore the costs and difficulties of redesigning these services now. Furthermore, for new, future services, as discussed in section III.C below, CALEA obligations may not apply at the outset under the "substantial replacement" test. Where they do not, the costs of network redesign must be assessed at the time that CALEA is deemed to apply.

C. "Information Services" and "Telecommunications Services" Are Not Mutually Exclusive Categories under CALEA

DOJ and US ISPA also agree that CALEA does not draw the same "binary" distinction between "telecommunications services" and "information services" that exists under the Communications Act.[17] That is, "[r]ather than creating two mutually exclusive categories, CALEA thus clearly contemplates that telecommunications carriers could also be engaged in providing information services."[18] But this does not mean, as DOJ seems to suggest, that the information services are subject to CALEA. To the contrary, section 103(b)(2) of CALEA provides an explicit exclusion for such information services – even when the information

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[15] *US ISPA Comments* at 20-21; Comments of The Rural Telecommunications Providers at 7-8.

[16] *DOJ Comments* at 44-45.

[17] *Id.* at 11, 24, 27; *US ISPA Comments* at 5-9.

[18] *DOJ Comments* at 11.

services are being provided by telecommunications carriers. The Commission cannot and should not read this exclusion out of CALEA.[19]

More generally, it is essential that the Commission apply the information services exclusion of CALEA. With respect to broadband access, the relevant distinction is between broadband transmission services (which are telecommunications services) and the Internet information services that "ride over" such transmission services. US ISPA proposes that the CALEA obligations should be limited to ***facilities-based telecommunications transmission services that are a component of broadband access services***.[20] Likewise, with respect to VoIP, the Commission should apply the statutory exclusions of CALEA and conclude that the only VoIP services covered by CALEA are ***IP-based voice services that are offered to the general public for a fee and do not fall within the CALEA exclusions for "information services," private network services, or services that interconnect telecommunications carriers***.

D. TTPs Should Not Have a Favored Status

Like US ISPA, DOJ takes the view that TTPs (which DOJ calls "service bureaus") should be neither favored nor disfavored under CALEA and that TTP-provided capabilities should not define which CII is reasonably available.[21] DOJ recognizes that conferring a favored status on TTPs also could have the effect of impairing the safe harbor under section 107(a) of

[19] *CALEA NPRM* at ¶ 50. *See also US ISPA Comments* at 5-9.

[20] CALEA, of course, would not cover transmission services that are offered as private network services or interconnecting telecommunications carriers. 47 U.S.C. § 1002(b)(2)(B).

[21] *DOJ Comments* at 48-52. *See also*, *US ISPA Comments* at 27-30; Comments of Nextel Communications, Inc. at 8; National Telecommunications Cooperative Association Comments at 5-6; Comments of Verizon at 23-25.

CALEA.[22] US ISPA shares DOJ's concerns that TTPs are not regulated entities and would not be subject to enforcement actions or other penalties under CALEA.[23] Because CALEA does not provide a favored status for TTPs, and because even law enforcement is wary of unchecked TTP power, there is a compelling legal and policy justification for maintaining the *status quo – i.e.*, that TTP services are simply one of the available CALEA compliance options.

US ISPA believes that the key risk with respect to TTPs is that they could gain preferred status with law enforcement by adding non-CALEA features to their services and could then charge high prices to carriers for providing such non-statutory features.[24] Indeed, VeriSign, Inc. ("VeriSign"), the leading proponent of TTP services, provides an excellent illustration of this risk in its comments. VeriSign proposes a new enforcement mechanism that would require regular performance testing and certification of continuing CALEA compliance by carriers and service providers.[25] But VeriSign's proposal has no statutory support in CALEA. Instead, VeriSign vaguely refers to "anecdotal information circulating among law enforcement, as well as VeriSign's own experience" to justify its proposal[26] in the evident hope that such a testing requirement would provide an opportunity for VeriSign to sell testing services that complement its TTP services. If the Commission were to grant TTPs a favored position in the CALEA compliance process, service providers would certainly be subjected to more of the same.

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[22] *DOJ Comments* at 50 ("Shifting CALEA compliance responsibilities to [TTPs] may also complicate and frustrate the proper role of safe harbor standards.").

[23] *DOJ Comments* at 49-50.

[24] *US ISPA Comments* at 28-29.

[25] Comments of VeriSign, Inc. at ¶¶ 71-72.

[26] *Id.* at ¶ 71.

E. Standards-Setting Process Should Not Be Limited to ANSI-Accredited Bodies

US ISPA also fully agrees with DOJ that the CALEA-recognized standards-setting process should not be limited to ANSI-accredited bodies and that "the Commission should permit any generally recognized industry association or standard-setting body to produce a CALEA standard."[27] This position is clearly mandated by CALEA.[28] The additional standards requirements urged by DOJ, such as keeping records of solutions rejected during the standards-writing process, are not based in CALEA and should be rejected.

III. CERTAIN LAW ENFORCEMENT POSITIONS REGARDING SCOPE AND IMPLEMENTATION OF CALEA ARE NOT CONSISTENT WITH THE STATUTE

Although there are numerous areas in which US ISPA and law enforcement can find common ground, US ISPA respectfully disagrees with certain law enforcement positions on the scope of the services covered by CALEA – especially the non-viable distinction between "managed" and "non-managed" VoIP services that has been proposed by the Commission and DOJ. US ISPA also disagrees with law enforcement on certain implementation issues, including the enforcement powers of the Commission, review of future services, compliance deadlines, and recovery of intercept costs.

A. The Commission Should Abandon The "Managed" Versus "Non-Managed" Distinction for VoIP Services

As US ISPA and other commenters have noted, the proposed distinction between "managed" and "non-managed" VoIP services is both inconsistent with CALEA and highly

[27] *DOJ Comments* at 54.

[28] *See US ISPA Comments* at 30-31.

confusing in its application.[29] DOJ compounds this confusion by suggesting that "managed or mediated" VoIP services exist where a "service provider[] [has] ongoing involvement in the exchange of information between its users."[30] DOJ indicates that such "ongoing involvement" would include "responsib[ility] to its users for the ongoing transport of information" or "any connection management, including call set-up, call termination, or the provision of party identification features, … [or] switching, signaling, or connection management during communication."[31] By attempting to define "managed" in such a broad fashion that virtually any VoIP service would be considered to be managed, DOJ illustrates the ambiguity and sweeping breadth of the Commission's proposed test.

DOJ also urges the Commission to "recognize that any VoIP service that enables its users to 'originate, terminate, or direct' voice-grade two-way telephone calls" can be a substantial replacement for traditional telephone service.[32] Effectively, this approach would allow the "substantial replacement" test to swallow any "managed" vs. "unmanaged" distinction. Such an approach both misapplies the substantial replacement test (ignoring even the limitations recognized by the Commission)[33] and ignores the "information service" exclusion.

In sum, DOJ's proposed approach to VoIP services casts such a broad net that it would potentially impose CALEA requirements on such services as voice-enabled instant messaging and communications through computer game consoles (*e.g.*, Xbox Live). But the Commission

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[29] *US ISPA Comments* at 13-16; *Industry and Public Interest Joint Comments* at 41-42.

[30] *DOJ Comments* at 31-33.

[31] *Id.* at 33.

[32] *Id.* at 34.

[33] *See CALEA NPRM* at ¶¶ 37-59. US ISPA submits that the Commission's reading of the substantial replacement test is itself impermissibly broad. *US ISPA Comments* at 3 & n.6.

has recognized that even law enforcement "does not propose to apply CALEA to services such as instant messaging or interactive game sessions."[34]

Rather than applying the confusing and overbroad "managed" versus "unmanaged" approach, or the equally confusing and even broader approaches proposed by DOJ, the Commission should stick to the language of the statute.[35] As noted above, the Commission should conclude that CALEA applies to ***IP-based voice services that are offered to the general public for a fee and do not fall within the CALEA exclusions for "information services," private network services, or services that interconnect telecommunications carriers***.

B. The Commission Does Not Have Authority to Implement a CALEA Enforcement Scheme

DOJ supports the tentative proposal in the NPRM that the Commission adopt its own rules for enforcement of the capability obligations. DOJ argues that CALEA creates "two parallel and complementary regimes for ensuring carrier compliance" – one involving the Commission and one involving the federal courts.[36] This proposed pair of parallel regimes has no basis in CALEA, which expressly places enforcement solely in the hands of the federal courts, as US ISPA has articulated in detail.[37] Numerous other commenters in this proceeding make the same point.[38]

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[34] *CALEA NPRM* at ¶ 53 & n.151.

[35] *See, e.g.*, Comments of Yahoo! Inc. at 9-10.

[36] *DOJ Comments* at 72-73.

[37] *US ISPA Comments* at 41-44.

[38] *Industry and Public Interest Joint Comments* at 52; Comments of the United States Telecom Association at 11-12; Comments of Motorola, Inc. at 20-23; Comments of CTIA – The Wireless Association at 10; Comments of the Coalition for Reasonable Rural Broadband CALEA Compliance at 13-15; Comments of Verizon at 25-26; Comments of the Telecommunications Industry Association at 4-7, Comments of Nextel Communications, Inc. at 11.

It also bears noting that DOJ's position contradicts findings made earlier this year by its own Office of the Inspector General ("OIG"). The OIG devoted a section of its April 2004 Report on CALEA to "Enforcement." In that section, it noted that "Section 108 provides for court issuance of enforcement orders" but that CALEA also "imposes strict limitations on enforcement orders."[39] It acknowledged the FBI's position that these limits could be avoided if the Commission were more cooperative in creating a separate enforcement scheme: "FBI personnel advised us that the Communication Act of 1934 provides the FCC with enforcement powers sufficient to compel carriers to comply with CALEA requirements but, for whatever reason, the FCC has not used such powers."[40] The FBI's own Inspector General was not persuaded that a separate Commission enforcement scheme could be created, saying: "In our judgment, CALEA does not give additional powers to the FCC."[41]

DOJ also cites several rulemaking proceedings in which the Commission has issued rules "that incorporate statutory provisions enacted by Congress."[42] But the examples that DOJ cites are to proceedings implementing statutory provisions that on their face delegate specific rulemaking powers to the Commission. For example, DOJ cites a proceeding in which the Commission amended its regulations to implement pay-per-call provisions of the Communications Act of 1934 (as amended) almost verbatim,[43] but in that case the Commission

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[39] U.S. Department of Justice, Office of the Inspector General, Audit Division, *Implementation of the Communications Assistance for Law Enforcement Act by the Federal Bureau of Investigation*, Audit Report 04-19 at 22, 23 (April 2004), *available at* http://www.usdoj.gov/oig/audit/FBI/0419/final.pdf (last visited Dec. 14, 2004).

[40] *Id.* at 23.

[41] *Id.*

[42] *DOJ Comments* at 74.

[43] *DOJ Comments* at 74 & n. 225 (citing *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, and*

was acting pursuant to a statutory provision that clearly states that one of its purposes was "to *recognize the Commission's authority to prescribe regulations and enforcement procedures and conduct oversight* to afford reasonable protection to consumers of pay-per-call services and to assure that violations of Federal law do not occur," and which specifically directed the Commission to promulgate the regulations in question.[44] Quite simply, CALEA has no similar language giving the Commission the power to incorporate section 103 into its rules.

DOJ compounds its misreading of CALEA by seeking to avoid any of the disadvantages that would otherwise flow from turning a law intended for judicial enforcement into a regulatory program. It argues that if the Commission takes enforcement authority, DOJ should not be required to exhaust administrative remedies before pursuing court action. It urges that enforcement by the Commission be "completely separate and apart" from court enforcement under section 108.[45]

Policies and Rules Impacting the Telephone Disclosure and Dispute Resolution Act, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14738, 14743 (1996)).

[44] 47 U.S.C. §§ 228(a)(2), 228(b) (emphasis added). Similarly, DOJ cites, as an example, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5386, 5387 (1996). *See DOJ Comments* at 74 & n. 225. In that proceeding, the Commission established a rule without notice and comment because, in the Commission's words, "the rule simply incorporates a provision of the 1996 Act. The Commission's action involves no discretion." *Id.* But with respect to CALEA, the Commission has acknowledged – by undertaking this rulemaking proceeding – that to implement CALEA as a rule would be an act of discretion on the Commission's part. More importantly, the language in section 641(b) of the Communications Act, as amended – the section to which the Commission was referring in making the statement above – contemplated that the Commission would play some regulatory role. Section 641(b) states that "[u]ntil a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such program during the hours of the day (*as determined by the Commission*) when a significant number of children are likely to view it." 47 U.S.C. § 561(b) (emphasis added).

[45] *DOJ Comments* at 77, 79-80.

This line of reasoning – which DOJ apparently pursues because of a concern that Commission proceedings could prevent or delay a court action – illustrates the serious weakness of its arguments regarding Commission enforcement. First, DOJ recognizes that the only way to avoid its concerns regarding exhaustion is for Commission enforcement to be "completely separate and apart," but this simply reinforces the conclusion that there is no basis for separate Commission enforcement. There is absolutely no legal basis for a conclusion that Congress, by enacting a statute that expressly provides for one enforcement scheme, actually intended to create two schemes – one express and one hidden – to cover the same set of obligations. Second, by signaling its intent to use judicial enforcement in some cases, DOJ makes plain that it would likely seek Commission enforcement only when judicial enforcement was unavailable or inconvenient. In short, Commission enforcement would be used to evade limitations that Congress wrote into the express judicial enforcement provision.

C. The Commission Should Reject *De Facto* Pre-Approval Requirements for New Technologies and Services

There is strong support in this proceeding for the Commission's tentative conclusion not to adopt rules regarding application of CALEA to future services.[46] Indeed, DOJ appears to concede that this is the proper outcome. DOJ accepts that "Congress expressly stated that CALEA does not permit any law enforcement agency to prohibit the adoption of any equipment, facility, service, or feature,"[47] and states "that DOJ is not seeking to require manufacturers or

[46] *CALEA NPRM* at ¶ 60-61. *See also US ISPA Comments* at 16; Comments of the United States Telecom Association at 14-15; Comments of Verizon at 13-14.

[47] *DOJ Comments* at 37-38.

service providers to obtain advance clearance before deploying any technology or service."[48] But DOJ makes proposals in its comments that substantially conflict with this position.

DOJ asks the Commission to "either establish an expedited procedure for resolving petitions seeking to establish applicability or inapplicability of CALEA or simply to commit to resolve petitions for declaratory ruling within 90 days."[49] It also urges the Commission to "*require or strongly encourage* all providers of interstate wire or electronic communications services that have any question about whether they are subject to CALEA to seek Commission guidance at the earliest possible date, *well before deployment of the service in question*."[50] DOJ concludes by threatening to "consider a service provider's failure to request such guidance in any enforcement action."[51] These proposals, if adopted, would constitute nothing less than a *de facto* requirement for service providers to seek advance clearance for new technologies and services. Specifically, service providers would be "require[d] or strongly encourage[d]" to seek Commission guidance on CALEA applicability "well before deployment," or else bear the risk that their failure to do so would be held against them in any subsequent enforcement action. Such a regulatory regime would be in direct contravention of the CALEA prohibitions that the Commission and DOJ recognize. DOJ and the Commission cannot do by stealth what Congress has expressly prohibited by statute. Accordingly, DOJ's proposals requiring *de facto* advance review of future services must be rejected.[52]

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[48] *Id*. at 37.

[49] *Id.* at 38.

[50] *Id*. (emphasis added).

[51] *Id.*

[52] More subtle, but of similar effect, are DOJ and Commission proposals to alter CALEA cost recovery rules, including by adopting an all-but-insurmountable standard for showing that CALEA compliance is not "reasonably achievable" under sections 107(c)(2) and 109(b)(1) of

D. Packet-Mode Compliance Deadlines Must Take Account of Evolving Packet Technologies and Software and Equipment Design Cycles

If the Commission decides to extend CALEA to broadband access and/or VoIP services, it must provide adequate time for service providers to implement these new obligations. The DOJ proposal that carriers be required to begin implementing CALEA solutions within the first 90-day period following a coverage determination, followed by an overall 12-month time period for full deployment of such solution,[53] is impractically and inflexibly short.

DOJ originally asked for a compliance deadline of 15 months once a coverage determination is made by the Commission.[54] Its request now for a 12-month deadline from the time a final order is issued in this proceeding appears to be an opportunistic reaction to a Commission suggestion of a 90-day compliance deadline, which even DOJ recognizes to be unworkable.[55]

In any case, compliance timelines of 15 months or less are simply not realistic and fail to take into account realistic equipment and software design cycles. The equipment and software development cycle itself can take as long as three to five years (especially for enterprise-grade

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CALEA. *See DOJ Comments* at 61-72. By setting an overly high hurdle for carriers to defend themselves from enforcement action through a timely petition for a determination that compliance is not "reasonably achievable," and by eliminating other avenues for cost recovery (*see* section III.E below), the Commission would subject carriers to potentially huge liability for deploying new services without CALEA compliance capabilities. This would put carriers under enormous pressure to seek Commission guidance on the applicability of CALEA to their technologies and services prior to deployment, in effect creating another *de facto* pre-approval requirement. The Commission should consider these effects in considering appropriate standards for "reasonably achievable" petitions and CALEA cost recovery more generally.

[53] *DOJ Comments* at 57.

[54] *CALEA NPRM* at ¶ 143.

[55] "DOJ believes the Commission should slightly modify its 90-day compliance proposal." *DOJ Comments* at 57. Furthermore, DOJ reminded the Commission that "unless the Commission allows for a longer timeframe [than 90 days] for carriers to deploy their intercept solutions, carriers are likely to file *en masse*, petitions for extension." *Id.* at 58.

software deployed by service providers), not including the time required for associated standards processes.

As US ISPA has proposed, compliance periods should be at least 15 months for the delivery of content, and at least three years for the delivery of CII.[56] The 15 months for communications content is a bare minimum. A significantly longer period is necessary for delivery of CII, since the issue of what CII will be deemed "reasonably available" remains entirely unclear and is likely to be the subject of future deficiency petitions (*see* section II.A above). Given the time required for equipment and software design, as well as associated standards processes (including deficiency petitions), a three-year compliance period for CII is actually quite conservative (and is shorter than the four-year compliance period that applied to circuit-mode services under CALEA).[57]

E. CALEA Intercept Costs Are Recoverable under Title III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[58] ("Title III") is explicit that "[a]ny provider of wire or electronic communication service" complying with a wiretap order "shall be compensated … for reasonable expenses for providing such *facilities* or technical assistance."[59] Furthermore, as numerous commenters in this proceeding have explained, the policy justification for assigning such costs to law enforcement is clear.[60]

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[56] *US ISPA Comments* at 35-36.

[57] 47 U.S.C. §§ 1001 note, 1003(b)(1).

[58] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 2510 *et seq.*).

[59] 18 U.S.C. § 2518(4) (emphasis added). *See also* 18 U.S.C. § 3124(c) (carriers who respond to a pen register or trap and trace order "shall be reasonably compensated for such reasonable expenses incurred in providing such *facilities* and assistance") (emphasis added).

[60] *US ISPA Comments* at 39-40; Comments of Global Crossing North America, Inc. at 15-17; Comments of T-Mobile USA, Inc. at 17-21; Comments of the United States Telecom

DOJ contends, however, that intercept provisioning costs recoverable under Title III do not include "capital costs."[61] DOJ's lengthy comments on this point are unable to overcome the fact that its position lacks legal support. The reference to "facilities" in Title III clearly indicates that providers can recover more than just the marginal costs of providing labor or other "assistance" when provisioning intercepts. "Facilities" are built with capital, and Congress's use of the word "facilities" shows its intent to permit reimbursement of providers' reasonable capital costs for intercept-related equipment and software, including CALEA compliance facilities.[62] In fact, the Commission has previously recognized that CALEA facilities costs can be recovered as part of intercept provisioning charges,[63] and there is no basis for it now to retreat from that position. Such a retreat would be problematic; the ability of providers to recover CALEA implementation costs as part of intercept provisioning was an important reason offered in support of the Commission's finding that the "punch list" capabilities requested by law enforcement were "cost-effective" under section 107(b)(1) of CALEA,[64] and a change of heart would require the Commission also to reconsider this prior conclusion.

Association at 10-11; Comments of Motorola, Inc. at 23-25; Comments of CTIA – The Wireless Association at 18-21; Comments of Nextel Communications, Inc. at 4-7; Comments of Corr Wireless Communications, L.L.C. at 10-13, Comments of The Rural Telecommunications Providers at 7-10.

[61] *DOJ Comments* at 88-94.

[62] US ISPA recognizes that the costs of such facilities must be charged to law enforcement on a properly amortized basis, and cannot be arbitrarily assigned to particular intercepts.

[63] *In re Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd 6896, 6917, ¶ 60 (2002) ("carriers can recover at least a portion of their CALEA software and hardware costs by charging to [law enforcement], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order.").

[64] *Id.* at 6916-17, ¶ 60.

DOJ bases its argument against recovery of CALEA capital costs primarily on its reading of section 109 of CALEA as placing responsibility for post-1995 CALEA implementation costs *solely* on providers. Section 109 does not bear the weight that DOJ places on it. Significantly, section 109 itself provides a vehicle for recovery of CALEA capital costs where compliance is not "reasonably achievable."[65] Furthermore, even to the extent that there are constraints on CALEA cost recovery under section 109, nothing in that section precludes cost recovery under the separate authority of Title III. As US ISPA has explained, implied repeal of other federal statutes permitting cost recovery would require much clearer expressions of Congressional intent than can be found in section 109.[66] In its desire to read section 109 broadly, DOJ even states that the section "specifically exclud[es] CALEA capital costs from being included in intercept provisioning costs."[67] But no such specific exclusion appears in section 109. Rather, section 109 merely addresses the payment of "reasonable costs" without additional specificity.[68]

To the extent that law enforcement perceives that intercept provisioning costs charged by providers are unreasonably high, a potential avenue for redress does exist. Title III empowers the court that issues a wiretap order to adjudicate the reasonableness of the costs charged.[69] Yet, to the best of the knowledge of US ISPA members, no federal law enforcement agency has ever challenged a provider's intercept provisioning charges as "unreasonable" – or made the specific argument that CALEA facilities costs should be excluded from a provider's intercept provisioning charges – before any court issuing a Title III order. This may reflect a recognition

[65] 47 U.S.C. § 1008(b)(2).

[66] *US ISPA Comments* at 37-38.

[67] *DOJ Comments* at 94.

[68] 47 U.S.C. § 1008.

[69] 18 U.S.C. § 2518(4).

that such arguments would be extremely difficult to advance in court pursuant to Title III. By presenting these arguments to the Commission, which certainly lacks Title III enforcement authority, DOJ attempts an end run around these constraints. The Commission should recognize its lack of authority on this matter and decline to adopt the DOJ's proposal.

Similarly, to the extent that the New York Office of the Attorney General ("NY OAG") complains that the intercept provisioning costs charged by providers under New York intercept laws are unreasonable,[70] its complaint is misdirected. The Commission simply has no jurisdictional basis for adjudicating the charges that may or may not be recovered under state law. Moreover, the NY OAG's allegation that carriers (especially wireless carriers) are overcharging law enforcement and "treating CALEA as a profit center"[71] is simply wrong. As a general rule, service providers lose money when responding to intercept orders. In fact, to a significant extent, law enforcement has been responsible for driving up the costs of intercepts by requesting increasingly sophisticated CALEA capabilities. It is inappropriate for law enforcement to now complain about the costs of provisioning intercepts or to demand that providers provide expensive CALEA compliance facilities for free.

IV. CONCLUSION

US ISPA submits that the Commission should implement CALEA for packet-mode services in a manner consistent with US ISPA's comments and reply comments. In many respects, those comments are entirely consistent with the positions taken by law enforcement. But where law enforcement and industry differ, the Commission must take care to apply CALEA

[70] Comments of the Office of New York State Attorney General Eliot Spitzer at 3, 12-16.

[71] *Id*. at 3.

as written, taking into account the central statutory goal of allowing unimpeded development of new technologies.

Respectfully submitted,

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